Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 103.

FIRST NATIONAL BANK OF LAKE BENTON, MINNESOTA,

Plaintiff in Error,

vs.

JOHN W. WATT.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

This was an action brought originally in the District Court for Lincoln County in the state of Minnesota for the purpose of recovering back, under Sections 5197 and 5198, of the Revised Statutes of the United States, the sum of $323, being twice the interest paid on a promissory note alleged to be usurious. After verdict in favor of the plaintiff appeal was taken from an order denying a motion

for a new trial to the Supreme Court of the state of Minnesota. That court having affirmed the original order, the case is now brought by writ of error to this court.

The amount which the plaintiff was allowed to recover in both the District and the Supreme Court of Minnesota, was double the entire interest which had been paid under the contract.

Watt v. First Nat. Bonk of Lake Benton, 79 Minn. 266.

ARGUMENT.

The only question which it is desired here to consider, is that of the proper construction to be placed upon the sections of the Revised Statutes of the United States, above cited. Those sections read as follows:

"Sec. 5197. Any association may take, receive, reserve and charge on any loan or discount made, or upon any note, bill of exchange or other evidences of debt, interest at the rate allowed by the laws of the state, territory or district where the bank is located, and no more.

"Sec. 5198. The taking, receiving, reserving or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same."

The issue between the parties is very sharply defined. It is contended by the defendant in error that in cases where usurious interest has been paid, the party paying the same may, under Section 5198, recover back in an action in the nature of an action of debt, twice the amount of the entire interest thus paid. On the other hand, it is our contention that the defendant in error was entitled to recover back in an action instituted under the above statute, a penalty equivalent simply to double the amount of the usurious excess so paid.

We are aware that on the question thus presented there has been considerable difference of opinion among the various state courts. It is our purpose here to show that on principle and on the better authority the amount of recovery should be limited under this statute, to double the usurious excess which has been paid. We are inclined to the belief that those courts which have allowed a recovery of double the entire interest, have been actuated by a rather over-zealous desire to favor the debtor as against the creditor, and have thus been led to enlarge upon the true meaning and intent of the statute.

We submit the following propositions:

First, *the statute was designed, in so far as it is applicable to cases where the debtor sues to recover back, merely to afford a simple and convenient method of relief in an action at law, which relief was not to extend further than that formerly afforded by courts of equity.*

It was early established, both in England and in this country, that the victum of the usurious contract, might seek relief therefrom in a court of equity. Even where he had paid the principal and usurious interest, he was entitled to a decree remitting him to the position which he would have occupied had no usury been exacted.

In cases where the principal and usurious interest had not been paid by the debtor, it was the universal practice to deny him any form of relief from the contract unless he made a tender of the principal and legal interest, it being regarded as against equity and good conscience to permit the complainant to come into court under any other circumstances. Furthermore, in cases where the debtor had paid up under the contract, he was entitled to relief, but such relief went only to the extent of a decree for the re-payment to him by the creditor of the usurious excess which had been exacted. The court universally held that it was against equity and good conscience to deprive the creditor of any part of the principal or legal interest. It is to be observed, therefore, that in the absence of statutory regulation, the debtor's claim to relief went only to the usurious excess and not to the entire interest. These principles have been laid down in

Jones v. Barkley, 2 Douglass, 697.
Fitzroy v. Gwillin, 1 T. R. 153.
Dey v. Dunham, 2 John. Chan. 191.
Fanning v. Dunham, 5 John. Chan. 123.
Palmer v. Lord, 6 John. Chan. 95.
Zeigler v. Scott, 10 Ga. 389.
Clarkson's Admr. v. Garland, 1 Leigh, 147.
Dole v. Northrop, 19 Wisc. 249.
Baum v. Thoms, 50 N. E. 357 (Ind.)

The views suggested by the defendant in error involves so wide a departure from the established practice as above shown, that it will not be presumed that Congress meant to enforce such views without the employment of plain and unambiguous language to that effect. Surely, a practice which has prevailed, we may say for centuries, should be given the benefit of any possible doubt.

Farmers Etc. Nat'l Bank v. Dearing, 91 U. S. 29, 35.

By providing for a recovery back in an action at law, of interest "so paid," the presumption would seem to be conclusive that Congress meant to permit a recovery back along those lines which had been laid down by courts of equity long before. It is only another case of an equitable doctrine being adopted perforce of statute by courts of law.

Second. *The statute under consideration is penal in its nature, and should therefore be strictly construed.*

This proposition we do not think will be seriously disputed. Such legislation on its very face purports to impose a penalty for the violation of a principle of public policy. In all of the cases discussing these sections of the Revised Statutes, their penal character is either assumed or openly assented to.

Barnet v. Nat. Bk., 98 U. S. 555.

Nash v. White's Bank of Buffalo, 37 Hun. 57, and other cases cited herein *possim*.

This being so, the well established maxim that such statutes are to be strictly construed, applies. We do not deem it necessary to cite authorities in favor of so plain and obvious a principle of law. From this point of view, it is difficult to see the justification for a construction allowing the recovery back of double the entire interest. It is respectfully insisted that a mere perusal of Section 5198 reveals its ambiguity. To be sure, the first part of the section dealing with attempts by the creditor to enforce the usurious contract is perfectly clear. He cannot enforce the payment of anything beyond the principal; the entire interest is forfeited; but when we come to the second part of the section, the word "entire" does not appear. It is only said that where the greater rate of interest has been paid, the party paying the same may recover back "twice the amount of the interest thus paid." This language is by no means clear and indubitable. The very fact that it has given rise to the difference of opinion among learned judges, which will appear from the briefs in this case, is ample evidence of the difficulties which the language presents. A liberal or a strict construction thereof makes all the difference between a decision pro and a decision contra. We do not think that it can for an instant be contended that this is a remedial statute to be construed in advancement of the remedy sought to be given by the statute considered as a whole. It can only be regarded as penal, and in that light the court has only one course to pursue, and that is to apply to the statute those principles

of strict construction which preclude any enlargement whatever upon the precise language which the legislature has employed.

"Equitable constructions though they may be tolerated in remedial, and perhaps in some other statutes, should always be resorted to with great caution, and never extended to penal statutes or mere arbitrary regulations of matters of public policy. The power to extend the meaning of a statute beyond its words and deciding by the equity and not the language, approaches so near the power of legislation that a wise judiciary will exercise it with reluctance and only in extraordinary cases."

Monson v. Chester, 22 Pickering, 385.

See also Farmers' etc. Nat'l Dearing, 91 U. S. 29, 35.

Oates v. Nat'l Bank, 100 U. S. 239.

That statutes prescribing a penalty for the taking of usurious interest are to be strictly construed, see

Tiffany v. Bank of Missouri, 18 Wall. 409.

U. S. v. Kansas Pac. Ry., 26 Fed. Cases, 680.

Pardoe v. Iowa State Nat'l Bank, 106 Ia. 345.

We do not wish to be understood as asserting that the rule of rigorous construction forbids a consideration of the general purpose which the legislature had in mind as gathered from the whole statute, in order to determine the precise meaning of the language employed, but we do insist that where that language in a penal statute is such as to admit reasonably of two constructions, then it is the duty of the court to adopt that construction which will preserve the rights of the party against whom the penalty is sought to be directed in the

same state as they were or would have been before the statute was enacted. It has been law from time immemorial that general words of a penal statute are to be restrained for the benefit of him against whom the penalty is inflicted. These principles were laid down in

Schooner Industry, 1 Gallison, 114.

This court in its strict construction of the statute under consideration has gone so far as to hold that the remedy provided for therein is exclusive in this sense—that the action to recover back must be a separate and independent one, and that the remedy cannot be availed of by way of counterclaim.

Barnet v. Nat'l Bank, *supra*.

To construe the second part of Section 5198 so as to involve a recovery back of the entire interest paid, is clearly, within the meaning of the decisions, a strained inference gathered from the first part of that section. Such inferences are unjustifiable in the extreme in dealing with a statute of this character.

Section 5198 manifestly provides for two separate and distinct classes of cases: First, a case where the creditor attempts to enforce the terms of usurious contract; and, second, the case where the debtor seeks to recover what he has paid on such a contract. Barnet v. Nat. Bank, 98 U. S. 555. In the one case, it is true, the entire interest is forfeited. In the other case the intention of the legislature is not clearly exhibited. Are we, therefore, permitted to infer that because in the former case

the legislature provided for a forfeiture of the entire interest, it was its intention so to provide in the latter? The contrary inference is surely not so unreasonable as to involve a stultification of legislative language or to warrant the criticism that such construction would be frittering the statute away by metaphysical niceties. Such a construction leaves a penalty. The only question is, how great that penalty was intended to be. The discrepancy between the penalties in the two cases may well be explained on the ground that the legislature intended to leave to national banks a *locus poenitentiae*. It would have been a perfectly easy matter for the legislature to provide for the forfeiture of the entire interest in the second case, had it so intended. In view, therefore, of the character of this statute and the language employed therein, the construction contended for by the defendant in error cannot be adopted.

Third. *The question has been judicially determined in accordance with the contention of plaintiff in error.*

Hintermister v. 1st Nat'l Bank, 64 N. Y. 212.
Bobo v. Peoples Nat'l Bank, 21 S. W. 888, (Tenn.)
Hardin v. Trimmier, 9 S. E. 342, (S. C.)
Nat'l Bank v. Johnson, 104 U. S. 271.
Nash v. White's Bank of Buffalo, 37 Hun. 57.
First Nat. Bank v. Denson, 22 So. 518 (Ala.)

Ever since the Hintermister case, the law has been established in favor of a recovery of only

double the excess, in New York. This doctrine has been enforced in many cases within that jurisdiction. The New York legislature, moreover, enacted a statute in every important respect similar to the sections under consideration. The construction which has been placed upon that local statute follows the lines laid down in the Hintermister case.

Nash v. White's Nat'l Bank of Buffalo, *supra*

It is not necessary for us to enter upon a long discussion of the authorities cited. The argument which we wish to press upon the court is well set forth in those decisions. We desire, however, especially to direct the court's attention to the case of Nat'l Bank v. Johnson, *supra*. That was an action brought in the Supreme Court of the state of New York by Johnson, to recover from the bank penalties alleged to have been incurred under Sections 5197 and 5198. Johnson was allowed to recover in the courts of New York the sum of $5470.72, such sum being double the interest which had been collected in excess of the rate allowed by the general laws of the state. The significant fact that the amount sued for was *double the excess* was noted in the statement of the case in the Supreme Court, and the case of Hintermister v. The National Bank, supra, was called to the attention of this court, although on another point. This court in that case assumed that double the excess was the proper amount recoverable in the action. Learned counsel, coming as they did from a state where the question of construction had been

so definitely settled, evidently overlooked the fact that this court had not finally passed upon the question and neglected to argue it. The fact, however, remains that although perhaps unconsciously so far as we are left to judge from the opinion, the question was passed upon, inasmuch as the judgment of the New York Court was affirmed. The whole question was before the court.

Some of the arguments appearing in the cases contra, which will be cited by counsel for defendant in error, may be briefly noticed. It is said that it would be absurd to suppose that Congress would provide a penalty of forfeiture of the entire interest for the making of a usurious contract, and at the same time provide for the forfeiture of only double the usurious excess as a penalty for the actual carrying out of such contract. In other words, it is said that there should be at least as heavy a penalty for the consummation of a usurious intention as for the simple manifestation of such intention by contract. The force of this line of reasoning is weakened at the outset when we consider that national banks have always been regarded both by Congress and by this court as national favorites—Tiffany v. Nat. Bank of Missouri—it may well have been, in view of such policy, the intention of Congress to allow these banks a *locus poenitentiae*. The long established course of legislative dealing with these banks renders it not only possible, but probable, that Congress meant to allow these banks an opportunity, even after the making of a usurious contract, to repent and accept only

the principal and legal interest. This view is borne out by the fact that, as is well established by the decisions, the act of usury is never regarded as consummated until actual payment was not only exacted, but made under such contract.

Wycoff v. Longhead, 2 Dall. 92.
Musgrave v. Gibbs, 1 Dall. 216.
Turner v. Calvert, 12 S. & R. 46.

Indeed, this court has consistently held that the borrower does not become entitled to his action of recovery back under Section 5198, until something beyond principal and legal interest has been paid by him on the alleged usurious contract. Not until he has in point of fact paid some of the usurious excess, is he held to have any action under the second part of that section.

Brown v. Marion Nat'l Bank, 169 U. S. 416.
Daingerfield Nat'l Bk v. Ragland, 181 U. S. 45.
McBroom v. Scottish Investment Co., 153 U. S. 318.

In the cases cited, it was held that the two-year limitation upon the action to recover back, did not begin to run until the usurious excess was actually paid. This has also been held in the state courts.

First Nat'l Bank v. Denson, 22 So. 518.

We cannot see how these decisions would be consistent with any holding such as is contended for by the defendant in error. If from one point of view the second half of Section 5198 looks to the excess, then it should always so look.

This construction is also consonant with the wording of the statute. It is said: "In case the greater rate of interest has been paid," then the action to recover back is permitted. The greater rate of interest referred to is the rate in excess of that permitted by law. Now, under this statute, if the borrower should pay not the greater rate which may well have been charged under the contract, but should pay only such portions of that greater rate charged as would correspond to the legal rate, then, under the statute, we submit he would have no action whatever to recover back, for it is only in case the greater rate has been paid that he is entitled to his action in the nature of an action of debt under Section 5198. The law clearly omits to provide for the case where the borrower under a usurious contract pays merely the principal and legal interest, thereby enforcing the theory of the existence of a *locus poenitentiae*, as above suggested.

Brown v. Marion Nat'l Bank, 169 U. S. 416.

In still another aspect the argument of the defendant in error is faulty, for it assumes that the penalty of forfeiture of the entire interest is in legal contemplation a greater penalty than a forfeiture of double that usurious excess. In most cases this would probably be so, but it is not necessarily so, for the excess may well be greater than the legal rate.

Finally, the charge that the construction contended for by the plaintiff in error would involve

an inconsistency on the part of Congress, is absolutely without foundation. As the law would stand if construed as we suggest, there would exist a forfeiture of the entire interest wherever the contract was sought to be enforced before consummation. Then, in case payment has been made by the borrower and such payment involves an excess over the legal rate of interest, a recovery might be had not only as at common law for the simple excess, but for double such excess. The duplication would be by way of penalty. Now, this construction admits of a *locus poenitentiae* as above stated, and is obviously on that account in furtherance of good morals and a preventive to litigation, for if the lender sees fit even after the making of the usurious contract, to repent and exact simply what he is entitled to, then, as we have seen, there can be no action in the courts. It is only when the lender adopts a positive and affirmative attitude with respect to his contract that he is to forfeit the entire interest. The law is not designed to place any obstacle in the way of the lender's retaining that to which he is justly entitled, that is to say, the principal and legal interest; but where he sues upon a contract usurious upon its face, the law will not permit him to exact performance of that contract, and where he retains the usurious interest exacted in accordance with the terms of such a contract, the law will not permit him to retain anything above what the common law regarded him as entitled to, namely, the principal plus legal interest. He will in the later case not only be forced

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to give up the excess as at common law, but will be compelled to give up double such excess, as a penalty for the exaction thereof. This construction is consistent with every sound principle of public policy. If, on the other hand, the construction contended for by defendant in error should be adopted the law would present strange anomalies. The borrower would then be in a far better position after he had paid than before he paid; for where he could only avoid paying interest on the money he had borrowed if he refused to pay, he could recover back twice the amount of the entire interest if he actually came in and paid the usury. We cannot believe that it could have been the intention of Congress to authorize a system which would be open to such flagrant abuses as this. A premium would be placed upon compliance with the usurious contract on the part of the debtor. It would be financially beneficial to him to carry out such a contract. To our mind it is manifestly more consistent with public policy and good morals to construe this statute so as to set up a system having a tendency to reform the guilty party, rather than a system having an unmistakable tendency to induce the party originally innocent to come in and share in the guilty transaction.

Respectfully submitted,

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